

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs May 19, 2009 at Knoxville

**LINDSEY BUTLER v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Maury County**  
**No. 16849     Jim T. Hamilton, Judge**

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**No. M2008-02194-CCA-R3-PC - Filed December 16, 2009**

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The pro se Petitioner, Lindsey Butler, appeals as of right from the Maury County Circuit Court's summary dismissal of his petition for post-conviction relief alleging that ineffective assistance rendered his guilty pleas involuntary. Following our review, we reverse the judgment of the post-conviction court for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed;  
Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Lindsey Butler, Whiteville, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa Roberge, Assistant Attorney General; and Mike Bottoms, District Attorney General, attorneys for appellee, State of Tennessee.

**OPINION**

The record reflects that the Petitioner pled guilty to various drug-related offenses and received an effective sentence of eight years to serve in the custody of the Department of Correction. The Petitioner filed a timely petition for post-conviction relief claiming that his trial counsel provided ineffective assistance that rendered his guilty pleas involuntary, unknowing, and unintelligent. On August 15, 2008, the post-conviction court summarily dismissed the petition for failing to state a colorable claim.

The Petitioner filed a notice of appeal on September 22, 2008 – seven days beyond the filing deadline. On appeal, the State asks this court to dismiss the Petitioner's appeal because the Petitioner failed to file a timely notice of appeal and failed to "cite any authority to support his propositions." See Tenn. R. App. P. 10(b). Regarding the timeliness of the notice of appeal, Rule 4(a) of the Tennessee Rules of Appellate Procedure requires the filing of a notice of appeal within

thirty days of the entry of judgment. However, the timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Tenn. R. App. P. 4(a). Because the notice of appeal indicates that the pro se Petitioner delivered the notice of appeal to prison officials on September 17, just two days beyond the filing deadline, we will waive the timeliness of the notice of appeal in this case. Furthermore, relating to the State's waiver argument under Rule 10(b) of the Tennessee Rules of Appellate Procedure, our review of the pro se Petitioner's brief indicates that he included proper citation to authority in his argument. Therefore, we shall address the merits of the Petitioner's appeal.

On appeal, the petitioner contends that the petition stated sufficient facts to support his claims of ineffective assistance of counsel and an involuntary guilty plea and asks this court to remand the case for the appointment of counsel, amendment of the petition, and an evidentiary hearing. The State asserts that the Petitioner "failed to set forth any facts in his petition" and that summary dismissal was proper. Following our review, we agree with the Petitioner.

### ANALYSIS

The decision of a post-conviction court to summarily dismiss a petition for post-conviction relief for failure to state a colorable claim is reviewed as a matter of law. See Burnett v. State, 92 S.W.3d 403, 406 (Tenn. 2002). Therefore, our review of the post-conviction court's dismissal is de novo. See id.; Fields v. State, 40 S.W.3d 450, 457 (Tenn. 2001).

Tennessee Code Annotated section 40-30-106(d) states that a petition for post-conviction relief must specify grounds for relief and set forth facts to establish a colorable claim. "A colorable claim is a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28, § 2(H). When the facts of a petition, taken as true, would not entitle a petitioner to relief, then the post-conviction court may dismiss the petition without the appointment of counsel or an evidentiary hearing. Tenn. Code Ann. § 40-30-106(f).

In the light most favorable to the Petitioner, the petition and the attached memorandum, allege several instances of ineffective assistance of counsel that, if taken as true, would render the Petitioner's guilty plea involuntary. The memorandum alleges that counsel was ineffective for failing to investigate areas regarding the sufficiency of the indictment, the constitutionality of the search and seizure leading to his arrest, and the existence of alibi witnesses. The memorandum further recites that trial counsel's failure to meaningfully communicate with him "negated the adversarial process" to which he is entitled. As an additional factual averment, the Petitioner alleges that trial counsel's lack of preparation led him to plead guilty under duress. He claims that "once it became manifest that the Petitioner's trial counsel was not prepared and had not interviewed witnesses, then and only then did the Petitioner enter a plea of guilty." Accordingly, we conclude that these allegations establish a colorable claim for relief that entitle the Petitioner to the appointment of counsel, amendment of the petition, and an evidentiary hearing.

Based upon the foregoing and the record as a whole, the judgment of the post-conviction court is reversed and the case is remanded for further proceedings consistent with this opinion.

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D. KELLY THOMAS, JR., JUDGE